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## Citation

Christine Desan, Writing Constitutional History Beyond the Institutional/Ideological Divide, 16 Law & Hist. Rev. 391 (1998).

## Published Version

<http://dx.doi.org/10.2307/744103>

## Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:10642451>

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## Writing Constitutional History beyond the Institutional/Ideological Divide

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History is a strange medium: it carries the most contemporary debates onto the most distant terrain. Both Bruce Mann and David Konig focus on the notions of change and context that undergird the forum essays. Those issues, more than any moment in early New York, link the articles and the comments. By exploring the way we defined “constitutions,” “constitutionalism,” and “constitutional history,” the commentators open up a large and current question. They invite a discussion about approaches to constitutional change.

The constitutional project that I would distinguish is the effort, proposed and conducted across generations, to construct a justified community from the accident of people who come together at a particular time and place. Families, firms, schools, and neighborhoods, among other entities, are constantly under constitutional construction. I focus here on the making of official government in order to distinguish one such project. Nothing limits the process, indeed much of the vocabulary of constitutional creation and change, to that conventional example. In each case, a constitutional project is the attempt made by many over time to coordinate human interactions by creating and legitimating a collective and an individual.

From the moment they define their association, those aiming at a constitutional order draw the categories that divide the world so controversially. There are the people inside and the people outside, those public and those private, the group and the individual. The constitutional drama begins from these lines, the effort to locate them in fact, and the unsettling existence of alternatives. So contemporaries identify a constitutional tradition as an enterprise both real—an issue of decision, action, and force—and theorized—a matter that must be justified or claimed legitimate and that is always vulnerable to challenge. The two aspects are joined. A constitutional project is, first, the making of a regime of relations that is tangible and concrete. It is the creation of a state, in the case I distinguish here, as dis-

tinctive as the culture or the ethos that seems sometimes more evocatively to mark an age. Second, a constitutional enterprise is the vetting of that new and official collective. It is the presentation of the regime just constructed as right and proper, as appropriate for all its participants, and it is open to dispute on that ground by any of them.

According to this approach, a constitutional tradition is at once a project that is unremittingly institutional and an enterprise that is as profoundly ideological. It is precisely the pull of those two axes, the institutional and the ideological, that creates an angle or plane of constitutional experience distinct from that described by political or intellectual histories, by cultural studies, or by other richly textured accounts of change. Such a definition requires that we reconsider the relationship often assumed between the institutional and the ideological coordinates.

Institutional realities are the dynamics that define the public in daily practice. They are not structures but actions, patterns drawn in very human terms. Government itself is not a thing, but a concatenation of decisions, made, enforced, and contested, about who should speak and with what authority. The mortal and changing character of institutions is often lost in existing accounts. And for every account that reifies institutional dynamics, there is another that ignores them. But institutions conceived as matters of everyday practice are the relationships that incarnate the state.

So government resolved to the level of experience is everywhere and each day constituted by practices that set apart the identities and decisions of people. Certain members of the community become agents or officials, representatives acting at a particular moment for the whole. Their role distinguishes them from those whose identities become, by contrast, private. The figures now public gain a corresponding authority; it allows them to act by privileging their decisions as official, or as expressions of the collective. That status separates their determinations from the conclusions of those who are speaking solely for themselves.

These divisions of role and authority are enormously effective. Pervasively, they change the way that people relate to each other: they activate a public and define participation in it, they shape decision making on matters collective, they determine the distribution of common resources, they mark the distance between members of a community. Day by day, differences of identity and decision put the state into circulation; it is not a structure but a mode of interaction. Hierarchy, in this dynamic world, is not architectural but immanent, drawn in lines of personal authority and reiterated in thousands of exchanges.

The regime of relations created is, at the same time, always a claim. The distribution of official agency and authority that realizes government is unavoidably a matter of ideology, a political assertion. In a community

conceived as constitutional, those assuming the public role represent that they, as agents of the whole, are speaking and acting for the whole so that the order they effectuate is legitimate, not oppressive.

Like the decisions that make the state, the discourse that legitimates it includes an aspect avowedly official. Justification is necessary to claim the status of right authority. That status operates, in turn, to distinguish the justification that counts. The claims of public agents do not occur in a vacuum; they exist in tension with a multitude of responses. The assertions of officials draw challenges from those defined as private by the current regime, who would allocate collective agency and authority in different ways. The struggle extends outward; the image of the state is made and unmade in powerful sources that are eclectic, inclusive, and colloquial. But alternative orders conceived and left too far from the line of contention die quietly there. The exchange over the legitimacy of a constitutional tradition attends the daily assertion of authority; it is pitched over the divide, inaugurated by that assertion and just as constantly contested, between public and private.

A constitutional history defined in this way focuses on governmental acts and the contest over their legitimacy. It locates as its subject the tradition of practice and justification that a society creates when its members are propelled by a promise of coherence between institutional realities (the divisions between people drawn actually) and ideological rationales (the justifications for those divisions). A constitutional regime requires defining participation in ways that allow a selective distribution of authority to be accepted as beneficial to the whole or as "right," just, or natural. The equilibrium is elusive, but the effort to reach it forges a public community—as well as marking off individuality—among a group defined by the confluence of presence in history and geography.

Writing constitutional history as the angle of experience formed when people order one another in the name of a larger public has clear implications. Most obviously, it proposes that a constitutional project occurs only as ideological claims are mediated through myriad acts, the practices establishing the lines of the state. To participants, the constitution of community exists as a claim made through various exchanges or, conversely, as practice of the public justified as such.

The point that institutional practice and ideological justification ineradicably inform one another means that constitutional traditions develop there, at that juncture, a distinctly human location. They are not so elemental as to be a matter of chemistry, nor so transcendent as to be a matter solely of discourse. The old institutional histories may, in fact, have assumed the scientific model in their emphasis on institutional development: representative structures, popular roles, separation of powers seemed almost natural components of some universalizable democracy. A certain political



community would follow predictably from the right mix of elements. Newer, ideologically oriented histories adopt the discursive standard in their emphasis on conceptual categories—turns of the mind, contingent and contextual to be sure—that emanate from a collective and form a culture of ideas, the vocabulary of an open debate conducted in an arc across a thousand political pamphlets, the press, the pulpit, the academy, other political and private arenas. In this view, a constitutional tradition is the outcome of a large political free-for-all, a contest of visions, interests, and arguments.

These invocations strike too low or too high. A constitutional tradition is neither an effort so consistent in its components that it becomes a science, nor so inflected that it escapes the mundane, the matter of the state, and becomes discourse or debate itself. Historians realized long ago that institutions were not basic elements, to be captured and combined in the right proportions, the ideological commitment to democracy like some constant medium. Institutions are changing arrangements, peculiar to an era and a community, affected at every moment by the shifting forces of ideologies themselves enormously complex. The commitment to constitutionalism as a matter of discourse or debate among many participants has a harder hold on the historiography. It fits with the Realist grasp of multiplicity in political and moral commitment. It takes the “interpretivist turn,” asserting that political, social, and economic contexts shape the very vocabulary of the speakers who inhabit them. And it places those speakers within a state we recognize—the container for a pluralist clash of persons and ideas, interest groups, and agendas. The collective becomes the occasion for a debate, in the end.

It is the last step that understates the presence of institutional forces. Conceiving the state as an occasion for a debate accords with the modern theory of a liberal state. The state itself is, however, a set of practices that are neither generic nor so recessive. Institutional particularity penetrates every ideological principle. The meaning of ideological commitments depends on how they are informed by a set of institutional assumptions. Concepts like “adjudication” and “legislation” are freighted with premises about the practices that compose them. The same is true about ideas of “due process” or “just compensation”: these notions change their very definition if they are tied implicitly to the courts, or if they are effectuated by other means of enforcement, like legislative determination. “Rights” themselves may be drawn on a judicial prototype, or they may be a reason for revolution. It is impossible to avoid issues of institutional practice; one can only leave them unexamined, much like the old histories left ideologies unproblematically assumed.

More is at stake in the metaphor, however, than a decision about how to describe a moment of experience. Change itself is cast differently, according

to the approach chosen. When constitutional form seemed a matter of chemistry, change was a science. Figuring out how to identify the correct components and how to combine them became a process of trial and error, and participants made progress toward an ever-more refined state. When constitutional form turned into a matter of debate, change became a function of the democratic market with its power and its shortcomings. Actors in such a market appear, *a priori*, as equal participants in the constitutional project. To be sure, they are situated in a context that creates grave inequities: wealth, class, ethnicity, gender, and other divisions produce enormous barriers to the free exchange of ideas and the constructive development of the community. Institutions transmit these differences, as do other legal arrangements. There is nevertheless a common currency—there are words and concepts that can be claimed by all, manipulated by many, traded a million times to build a world no one quite anticipated. So politics, in this view, remains comfortably open and uncertain: combustions or slow transformations can occur across social and economic barriers. People so energized can act independently and in concert to assert a new constitutional course.

If institutional realities were inert ingredients when constitutional change seemed a science, they are distinctly derivative products in the market view of constitutional change. The state itself acts as a conduit that delivers results or allows them. But that role renders it, ironically, almost transparent. As struggles that seem to be located elsewhere—across class, gender, or economic status—generate the operative issues, the differentials of role and authority created by the state become less problematic. That result diverts inquiry into how the very practices and routines at issue in constitutional change—the ways that people draw the state in their real actions—themselves affect the process of transformation.

Constitutional change is neither a science nor a debate but a radically different enterprise. It is a matter of elaborating a field of human relations, built on the earthly level between the elemental and the air. An ordering of persons set in motion earlier than any of its members, a constitutional tradition locates them and shapes their contributions to its continuation. The institutional dynamic does not recede, evaporate, or fade to facilitate an exchange of views more amorphously offered. Rather, the issue is how people assuming very different roles and given dramatically divergent amounts of authority themselves extend, accept, or challenge the order in which they find themselves.

The question tracks the state through the interactions that compose it. Contests over official identity and decision arise in the center of an empire and on its marchlands. That they occur everywhere extends rather than dissipates their importance; the shape of government remains a matter defined by differences in authority. So those on the frontier may create a

relationship with imperial officials unattainable elsewhere in the empire where the legitimacy and practical power of such agents exert more force. Indeed, it may be possible to reinvent public authority on the margin, while others near the center can find no opening in the patterns of government that surround them. And those who do succeed in reordering their constitutional worlds themselves rely on roles and authority selectively distributed. A vote, for example, may open opportunities to some while constricting the voice of many others to a single point.

Under such circumstances, justification itself splinters. There is no assurance that participants so variously located have agreed or accepted a regime, if those words assume a decision measured by neutral or unconditioned means. Consensus is not a particularly meaningful concept in such circumstances, nor does deliberation occur in common or at the same moment. Instead, a constitutional project prevails as an attempted organization of the public, proposed when the enterprise is already underway. Constitutional status becomes a movement of initiative and commitment, despair and default rather than a static matter of choice or consent.

Histories no longer claim to be either exhaustive or self-contained; there turned out to be no discrete territories of human life that could be parsed and separately detailed. The scope of human circumstance in turn, however, threatens to overwhelm any account. The challenge is to write another sort of history altogether, one that filters the past and fits it together through a particular definition rather than dividing and transmitting it as if transparently. A history should identify some aspect of human experience—a constitutional trajectory in this instance—without rendering it either isolated from other aspects of life or indistinguishable from them.

Locating constitutional change in the effort made by people to draw a state that they can justify does not isolate it. People act to create public and private driven by concerns that range from the ethical to the economic. They justify, receive, or respond to those divisions in the same world. Practice and legitimation thus depend dramatically on their context. The approach sketched above does, however, direct attention to a particular trajectory of experience. It locates the abstraction of constitutional discourse in the daily relations of people divided in the name of a collective. And by following institutional realities to their end, it throws into relief the tiered descent of authority.